No. 87-1589

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

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THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
*Petitioner*,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 87 labor unions representing approximately 13,500,000 working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for by the Rules of this Court.

## ARGUMENT

### Introduction and Summary

This case poses a question that is arising with increasing frequency and urgency in today's economy: when a business entity goes through a reorganization which results in operations previously performed by a "predecessor" firm being performed by a "successor" firm, to what extent can the predecessor's employees, through collective bargaining and collective bargaining agreements, protect their jobs and their labor standards?

We pose the question in these terms to emphasize at the very outset what is *not* at issue in this case. That is especially important here because the briefs on the other side are to a very large extent devoted to arguing hypothetical questions that are not posed by this proceeding.

*First*, this case does *not* present any question as to the right of the petitioner Pittsburgh & Lake Erie Railroad Company ("P&LE") to decide to sell its assets to some other entity, and to so decide without bargaining with the exclusive representatives of the P&LE employees. As the court below aptly stated, "The dispute in this case is not about the decision to sell the P&LE's rail lines; it is about the effects of that decision on the employees of the railroad." 845 F.2d at 428. In other words, this case is *not* a variation on the cases such as *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), in which this Court has confronted the question of whether an employer that intends to close an operation—or transfer the operation to a third person—has an obligation to bargain in good faith with the representative of the affected employees over that business decision itself. *See id.* at 677 & n.15, 681-682 (discussing the established distinction between such "decision" bargaining and "effects" bargaining).

*Second*, this case does *not*, moreover, present any contract interpretation question. P&LE does not have even a colorable claim that its employees' unions have agreed —explicitly or implicitly, in general terms through a management rights clause or in specific terms through a clause dealing directly with the rights of a successor employer, in direct bargaining or by acquiescence in an established past practice—to a reorganization in which a successor employer would be free to continue the P&LE operations, in whole or in part, with a new workforce paid lower wages and accorded lesser working conditions.

*Third*, this case likewise does *not* present any question as to the right of the P&LE, or of its successor, to dis-



continue certain operations—as opposed to shifting the performance of those operations from one business entity to another—and to furlough the employees whose work is eliminated as the result of the discontinuance. Under its collective bargaining agreements, P&LE is authorized to make furloughs where work is eliminated and P&LE has, in fact, from time to time, exercised that right. And, on any view of this case, P&LE's would-be successor—P&LE Railco—likewise would assume that right. To put this point in concrete terms, it is uncontested that were the transaction between P&LE and P&LE Railco to be consummated, Railco would be free, without the need to engage in a new round of collective bargaining, to operate with the number of employees commensurate to the size and nature of Railco's operations and not the number commensurate to the size and nature of P&LE's present operations.

What *is* at issue here is whether P&LE Railco also would be free—without securing a new collective bargaining agreement and, indeed, without engaging in collective bargaining—to both continue the P&LE operations and hire an entirely new workforce to do the work under newly-established wages and working conditions. It is our submission that permitting P&LE Railco to do so would be fundamentally inconsistent with the policies of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA").

In arguing for that conclusion, our analysis diverges to some extent from the reasoning of the decision below. That decision rests on the premise that, if P&LE were to consummate the sale of its assets to P&LE Railco, the successor would *not* be bound by the current collective bargaining agreements, at least absent an express provision in the agreements which binds successors. 845 F.2d at 422. On that premise, in these circumstances, the successor would be free to disturb the status quo—specifically to hire new employees and establish new wages

and working conditions—without exhausting the RLA's procedures for amending or modifying such agreements. Thus, the appellate court understood this case to turn on the extent of the P&LE duty to bargain over "the effects on the employees of the sale," in response to a notice by the representatives of its employees under § 6 of the RLA, 45 U.S.C. § 156, seeking such bargaining and the extent of P&LE's further duty to maintain the status quo pending the conclusion of the RLA's mandated bargaining process. *See* 845 F.2d at 432.

In Part I we show that this premise of the decision below is unsound. Under the RLA, where a corporate reorganization results in a successor which continues the predecessor's operations (in whole or in part), the RLA treats the business as ongoing and *as a matter of law* requires both the successor and the union to abide by the current collective bargaining agreement until modified through bargaining. In this respect, the RLA differs from the National Labor Relations Act, as amended by the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* ("NLRA"), which ordinarily frees a successor employer from a predecessor's labor contracts and frees the employees affected by the corporate transaction to exercise economic leverage to preserve or improve their labor standards in successorship situations.

In Part II we accept *arguendo* the premise of the decision below, and address P&LE's bargaining and status quo obligations under the RLA. As we show, at the very least, the RLA precludes P&LE from reorganizing in a manner that would alter the "objective working conditions" of P&LE's employees for so long as the Company and its employees' exclusive representatives are involved in the process of negotiations and mediation over the effects of the reorganization on those employees mandated by RLA § 6. The issues raised by that notice were, under this Court's decision in *Telegraphers v. Chicago N.W.R. Co.*, 362 U.S. 330 (1960), bargainable issues.



That being so, § 6 requires P&LE to preserve the "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Shore Line v. Transportation Union*, 396 U.S. 142, 153 (1969). By taking action—not expressly authorized by the extant collective bargaining agreement or by settled past practice—to terminate the employment of P&LE's employees and to provide for the hiring of a new workforce of one-third the present size paid at reduced wages, P&LE would violate its obligation under § 6 to preserve the preexisting "objective working conditions." For this reason, too, the court below properly issued an injunction to preserve the status quo.

## I. The Railway Labor Act Provides, As A Matter of Law, That Collective Bargaining Agreements Survive Corporate Reorganizations Such As The One Here And Bind The Corporate Entity That Emerges From The Reorganization

A. The threshold question raised by this case concerns the rules the RLA establishes for determining the status of a collective bargaining agreement over a corporate reorganization. That is a question of first impression in this Court. In contrast, however, this Court has faced the comparable question in a trilogy of NLRA "successorship" cases.

This Court has repeatedly "emphasized that the NLRA 'cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.'" *TWA Inc. v. Flight Attendants*, —— U.S. —— (Feb. 28, 1989), Sl. Op. p. 11 quoting *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383 (1969). At the same time, the Court has recognized that carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in decid-

ing cases under the RLA. *TWA*, Sl. Op. at p. 5. We therefore begin our analysis with a discussion of the NLRA successorship decisions in this Court.

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), the predecessor, Interscience, was acquired by, and merged into, the successor, Wiley, which hired virtually all of Interscience's employees. The Union representing Interscience's employees sued under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to enforce the extant collective bargaining agreement against Wiley. In particular, the union sought to compel Wiley to abide by the arbitration provision in the agreement. The Court ruled for the union stating:

> We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances . . . the successor employer may be required to arbitrate with the union under the agreement. [376 U.S. at 548.]

The Court explained that the "objectives of national labor policy . . . require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *Id.* at 549. And while recognizing that "the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party," *id.* at 550, the Court concluded that "a collective bargaining agreement is not an ordinary contract":

> Central to the peculiar status and function of a collective bargaining agreement is the fact . . . that it is not in any real sense the simple product of a consensual relationship. . . . This case cannot readily be assimilated to the category of those in which



> there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. [*Id.*]

Thus, at least so long as there is "substantial continuity of identity in the business enterprise" so that a duty to arbitrate can "reasonably be found in the particular bargaining agreement and the acts of the parties involved," *id.* at 551, the "preference of national labor policy for arbitration as a substitute for tests of strength between contending forces" during the term of a collective bargaining agreement dictates binding the successor to the preexisting agreement, *id.* at 549.[1]

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Court returned to the competing interests in industrial peace and in the freedom of collective bargaining addressed in *Wiley*, albeit in a rather different context. The question in that case was whether Burns—which had successfully bid on and taken over a contract to provide plant security protection and had hired the predecessor's employees to perform the underlying work—had violated the bargaining obligation stated in NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5), by refusing to assume the extant collective bargaining agreement and by unilaterally fixing the initial terms on which Burns

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[1] The *Wiley* rules does not apply where the transaction integrates the predecessor's operations and workforce into a larger successor's operations and workforce and the latter group of employees is already represented by a certified representative and covered by a collective bargaining agreement. *See, e.g., McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352 (C.A. 2, 1966).

In the instant case, of course, the putative successor is a new entity which prior to the transaction had no employees of its own. Thus, this case does not raise any of the questions which arise from transactions which result in the integration of two workforces or the respective rights of competing labor organizations during and after such a transaction. We therefore do not address that complex of issues in this brief.

would hire its predecessor's employees. The Court answered that question in the negative.

Distinguishing *Wiley*, the *Burns* Court concluded that although Burns was obligated by § 8(a)(5) to bargain with the union which represented the predecessor's employees, that section does not require a successor employer to assume the predecessor's labor contract. The Court concluded that it is the policy of the NLRA in such successorship situations "to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities." 406 U.S. at 288. The opposite conclusion, the Court stated, could "inhibit the transfer of capital," by limiting the successor's ability to "make changes in corporate structure, composition of the labor force, work locations, task assignments, and nature of supervision. *Id.* at 287-288.

Two years after deciding *Burns*, the Court again confronted the successorship issue in *Howard Johnson Co. v. Hotel Employees* 417 U.S. 249 (1974). Like *Wiley*, and unlike *Burns*, *Howard Johnson* was a § 301 action to enforce a collective bargaining agreement. Unlike both *Wiley* and *Burns*, however, the successor in *Howard Johnson* had acquired certain of the predecessor's operations in an asset sale and had hired a new workforce rather than retaining the incumbent employees. And, unlike *Wiley*, the predecessor firm in *Howard Johnson* continued in business albeit in different locations. The Court concluded that in the context of the kind of transaction involved in *Howard Johnson*, it was "improper to hold [the successor] to the substantive terms of a collective bargaining agreement which it had neither expressly nor impliedly assumed." 417 U.S. at 255.

In reaching this conclusion the *Howard Johnson* Court distinguished *Wiley* on two grounds. To begin with, the Court observed, *Wiley* "involved a merger, as a result of which the initial employing entity completely disappeared. In contrast, this case involves only a sale of some assets, and the initial employers remain in existence as viable corporate entities." 417 U.S. at 257. Furthermore, in *Wiley*, "the surviving corporation hired *all* of the employees of the disappearing corporation," whereas Howard Johnson exercised what the Court termed "the new employer's right to operate the enterprise with his own independent labor force," *id.* at 258, 264 (emphasis in original.)[2]



B. Read together, *Wiley*, *Burns*, and *Howard Johnson* teach, first of all, that under the NLRA, "[i]n light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate." *Howard Johnson*, 417 U.S. at 456.

On the facts in *Wiley*, in which the contracting employer "disappear[ed]" into another "by merger," followed by the "wholesale transfer of [the predecessor's] employees," 376 U.S. at 548, 551, the Court found that the interest in avoiding "industrial strife" outweighed "the rightful prerogative of owners independently to rearrange their businesses," *id.*, at 549.[3]

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[2] The *Howard Johnson* Court acknowledged that its holding cut off the union's ability to enforce the provision of its extant collective bargaining agreement, which stated that the agreement was binding on successors, against the successor and indicated that the union's only option was to seek enforcement against the predecessor. 417 U.S. at 258 & n.3.

The Court intimated, moreover, that where a predecessor and successor do not abide by such a provision a union might "enjoin the sale . . . on the ground that this was a breach by the [predecessor] of the successorship clauses in the collective bargaining agreements," *Id.*

[3] There may be other situations as well in which it is "within the reasonable expectations of the parties," *Howard Johnson*, 417 U.S. at 257, that a collective agreement will survive a corporate reorganization, and in which the successor will be deemed to have

In contrast, in the contracting out situation involved in *Burns* and in the type of asset sale involved in *Howard Johnson*, the Court found that the interest in "freedom of collective bargaining" and in the "free transfer of capital" predominates over the interest in industrial peace, *Howard Johnson*, 417 U.S. at 254-255.

We hasten to add—for it is absolutely central to the decisions—that the employer freedoms recognized in *Burns* and in *Howard Johnson* are not absolute; the Court has recognized that the affected employees, too, are free to advance and protect their interests. The NLRA leaves the determination of the respective rights of the parties to "'"the relative strength . . . of the contending forces,"'" *Howard Johnson*, 417 U.S. at 264, and to "economic power realities," *Burns*, 406 U.S. at 288. The affected employees have the right to apply economic pressure against the predecessor-employer to require that employer to protect the employees over a transition. And, if the successor elects to hire the predecessor's employees and thereby assumes a bargaining obligation, the employees have the right to apply economic pressure against the successor as well. In either event "[t]he congressional policy manifest in the [NLRA] is to enable the parties to negotiate for any protection either deems appropriate." *Id.*

C. The foregoing summary of the NLRA successorship law is sufficient to demonstrate that this Court has made one salient point so plain as to be beyond any dispute: the NLRA would *not* permit the result that P&LE seeks here.[4] According to P&LE, the Company may consum-

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"assumed the obligations under the old contract," *Burns*, 406 U.S. at 291.

[4] There is, of course, much that remains unsettled under the NLRA regarding successorship. Indeed, it is far from certain how this case would come out under the NLRA.

On the one hand, the transaction between P&LE and P&LE Railco is, in form, an asset sale like the sale in *Howard Johnson*; so viewed, the collective bargaining agreement would not survive this transaction in an NLRA case.

On the other hand, under P&LE's version of this transaction, what the Company is seeking to do is to "go out of business," Pet. Br. at 14, 18, 21, 22, 25, and to be succeeded by P&LE Railco which is prepared to "give preference to P&LE employees in establishing its workforce," Pet. Br. at 4. Such a transaction is, in its substance, quite similar to the transaction at issue in *Wiley* and thus one in which it would follow from *Wiley* that the extant collective bargaining agreement would survive.



mate the sale to P&LE Railco and Railco is free to hire a new workforce and to establish new wages and working conditions without regard to P&LE's collective bargaining agreements, *yet P&LE's employees are not free to respond by using their economic leverage to protect their jobs and their wages.* As P&LE puts its contention in its brief, the Company is free to act to rearrange its affairs without going through the RLA bargaining process and without any ado but its "unions were free to strike only after having exhausted the RLA's major dispute procedures. Their strike prior to the exhaustion of those procedures violated the RLA." Pet. Br. at 65.

The regime P&LE champions is anathema to the NLRA. *Burns* could not be clearer in this regard:

> Preventing industrial strife is an important aim of federal labor legislation but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal. When a bargaining impasse is reached, strikes and lockouts may occur. This bargaining freedom means both that parties need not make any concessions as a result of Government compulsion and that they are free from having provisions imposed upon them against their will. [407 U.S. at 287.]

And the *Burns*' opinion continues:

> The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of

bargaining advantage to be set by economic power realities." Under the NLRA the "price" of "bargaining freedom" is that "strikes and lockouts may occur." [*Id.* at 288.]

D. The imbalanced system P&LE urges—one in which employers can act but employees cannot react—is equally at war with the RLA's premises. Like the NLRA, the RLA protects "the ultimate right of the disputants to resort to self-help," including "[o]n the side of labor . . . the cherished right to strike." *Railroad Trainmen, supra*, 394 U.S. at 378, 384. Indeed, "[p]eaceful primary strikes and picketing incident thereto lie within the core of protected self-help under the Railway Labor Act." *Id.* at 386. And like the NLRA, the RLA provides for a *balanced* system which "let[s] loose the full economic power of each [party]" when "the machinery of industrial peace fails." *Id.* at 384.

*Railway Clerks v. Florida East Coast R. Co.*, 384 U.S. 238 (1966), is illustrative in this regard. There this Court rejected a union's attempt to prevent an employer from altering the status quo once the union had commenced a strike; the Court reasoned that "[i]f [the status quo concept in] § 2, Seventh is applicable after a lawful strike has been called and after lawful self-help has been invoked by the carrier, *the right of self-help might become unilateral to the workers alone and denied the carrier.*" *Id.* at 246 (emphasis added).

Conversely, in *Shore Line v. Transportation Union*, 396 U.S. 142 (1969), the Court prevented an employer from acting unilaterally even though in that case the contract did not prohibit the particular action the carrier sought to take. The Court explained that "If the railroad is free to . . . resort to self-help" during the RLA's bargaining process "the union cannot be expected to hold back its own economic weapons, including the strike. *Only if both sides are equally restrained* can the Act's remedies work effectively." *Id.* at 155 (emphasis added).



Thus, P&LE's argument for a rule under which employers may take unilateral action but the affected employees are barred for reacting must be rejected as incompatible with the structure and policies of the RLA.

E. The question posed here thus reduces to whether in this case, as in *Wiley*, the extant collective bargaining agreement should be held, as a matter of law, to continue over the corporate reorganization, or whether, as in *Burns* and in *Howard Johnson*, the relationships between P&LE, P&LE Railco and P&LE's employees should be settled by "'"the relative strength of the contending forces."'" The former conclusion would obligate P&LE Railco to continue employing those P&LE employees for whom work remains under the wages, rules and working conditions provided for in P&LE's collective bargaining agreements. The latter conclusion would free Railco to hire a new workforce under new working conditions and would also free the P&LE employees to exercise their economic leverage to protect their jobs and labor standards.

Before turning to the legislative materials bearing directly on the choice that is posed, one threshold point is in order. As just explained, the RLA, like the NLRA, accords an equal and balanced right to each of the parties to a labor dispute to engage in economic self-help. The two labor laws diverge, however, in that the RLA much more strongly than the NLRA *disfavors* such economic warfare. The RLA rests on the premise that in rail and air disputes, "'more is involved than the settlement of a private controversy without appreciable consequences to the public'"; "[i]n our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers were stopped." *Florida East Coast*, 384 U.S. at 244. Thus the RLA's "*primary objective* [is] the prevention of strikes." *Shore Line*, 396 U.S. at 154 (emphasis added).

It is for this reason that the RLA creates "an almost interminable process" of "negotiation, mediation, volun-

tary arbitration and conciliation," and contains a set of status quo provisions designed "to prevent the union from striking and management from doing anything that would justify a strike." 396 U.S. at 149-51. As the Court has stated, " 'the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute.' " *Id.* at 149, *quoting Florida East Coast*, 384 U.S. at 246.

It would be fundamentally inconsistent with this statutory scheme to hold that corporate reorganizations, accomplished through an asset sale, in which the successor corporations continues the predecessors operations in whole or in part, create a new occassion for economic warfare. It is not surprising, then, that whereas under the NLRA there is an "absence of congressional guidance," *Howard Johnson*, 417 U.S. at 456, as to the status of extant collective bargaining agreements in such successorship situations, Congress has *specifically focused* on that question in the RLA context. As we now show, in so doing Congress has concluded that, as a matter of law, collective bargaining agreements should be held to continue across such corporate reorganizations.

(1) Congress first addressed this issue in 1933 in enacting a set of amendments to the Bankruptcy Code. *See* 47 Stat. 1467. Those amendments, *inter alia*, created for the first time a procedure by which the railroads could invoke the protection of the bankruptcy courts. (Prior to the 1933 amendments, railroads were subject to equity receiverships at the behest of creditors but could not avail themselves of the bankruptcy procedure.) Significantly, in extending to railroads the right to invoke bankruptcy, Congress mandated in § 77(o) of the 1933 Bankruptcy Act that

> No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees, except in the manner prescribed in the Railway Labor Act. . .



The legislative history makes clear that Congress adopted this provision because "in some instances equity receivers have disregarded the provisions of the railway labor act and have arbitrarily reduced the wage scale." 76 Cong. Rec. 2927 (Rep. LaGuardia). Congress thus sought to "*keep effective the machinery under which railroads in their ordinary operations change their wage scale*, and so forth, as between themselves and their employees." *Id.* at 5355 (Rep. Summers, Chairman of the House Judiciary Committee) (emphasis added). *See also id.* at 5118-22.

Thus, Congress determined that not even the exigencies of the transition over a bankruptcy reorganization justify freeing the successor from extant RLA collective bargaining agreements.

(2) Several months after enacting the Bankruptcy Amendments, Congress considered a related aspect of the same problem in connection with the enactment of the Emergency Railroad Transportation Act, 48 Stat. 211 ("ERTA"). That law created for up to two years a "Federal Coordinator of Transportation" whose task it was to facilitate the consolidation of railroads in order to "avoid unnecessary duplication of services," ERTA § 4(a); towards that end, ERTA suspended the operation of the antitrust laws and "all other restraints or prohibitions of law, State or Federal, other than such as are for the protection of the public health or safety," ERTA § 10(a). ERTA specifically provided, however,

> That nothing herein shall be construed to repeal, amend, suspend or modify any of the requirements of the Railway labor Act or the duties and obligations imposed thereunder *or through contracts entered into in accordance with the provisions of said Act* [*Id.*; emphasis added]

And ERTA further provided that

> Carriers, whether under control of a judge, trustee, receiver, or private management, shall be required

> to comply with the provisions of the Railway labor Act and with the provisions of section 77 . . . of the [1933 Bankruptcy] Act [ERTA, § 7(e)]

This latter provision was one of several amendments to the original bill that the rail unions, through their Railway Labor Executives Association ("RLEA"), presented to the Senate and House Committees in 1933.[5] Indeed, on the floor of both the House and the Senate the sponsors of ERTA made a large point of noting that the bill was supported by the RLEA and incorporated, in substance, the RLEA's suggestions. *See* 77 Cong. Rec. 4256 (Senator Dill); 4870 (Representative Cooper).

In presenting its amendments to the Senate and House Committees, the RLEA, through its legal counsel, Donald Richberg, explained that

> In the desire to create economies and the necessity of economy during the depression, we have had simple disregard of the requirements of the law *and the arbitrary changing of working conditions for men all over the country, as part of these consolidations.* [1933 Senate Hearings, *supra*, at 101 (emphasis added).]

Richberg went on to argue that since the Bankruptcy Amendments had prohibited judges and trustees from altering collective agreements over the transition of a bankruptcy reorganization "it seemed appropriate that a *similar provision should be written into this law governing the carriers under private management.*" *Id.* at 106; *see also 1933 House Hearings, supra*, at 108. With that understanding, the RLEA proposal was included in the bills recommend by both the House and Senate Committees and passed by the Congress.

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[5] *See Hearings Before the Senate Committee on Interstate Commerce on S. 1580*, 73rd Cong. 1st Sess. 85 (1933); *Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5500*, 73rd Cong. 1st Sess. 72 (1933).



Thus, Congress determined that not even the general financial collapse of the railroad industry justified freeing the successor firms that emerged from consolidations and other reorganizations arranged by the Government from extant RLA collective bargaining agreements.

(3) One year after the enactment of ERTA, Congress amended the RLA. One of the purposes of those amendments was, as Joseph Eastman, the Federal Coordinator of Transportation and principal author of the 1934 bill testified, to "put in the permanent law [*viz.* the RLA] . . . the provisions which the Congress has felt it necessary to apply to railroads both in the Bankruptcy Act and the Emergency Railroad Transportation Act."[6] Mr. Eastman explained:

> [T]he principle [of the amendments] was spelled out in definite prohibitions in the Bankruptcy Act, so far as bankrupt carriers are concerned, and that measure is a part of the permanent law. These same definite prohibitions, which were inserted in the Bankruptcy Act, were made applicable to every carrier in [ERTA], but that is a temporary measure. It seems plain that these provisions belong in the permanent law, and the Railway Labor Act is clearly the place for them. That is the reason for section 2 in the proposed bill.[7]

At the time of the 1934 amendments, the RLA already included, in § 6, a prohibition on changes in wages and working conditions while bargaining is underway. But the RLA of 1926 did *not* include an analogue to the 1933 Bankruptcy Act or to ERTA requiring that RLA collective bargaining agreements would continue over corporation transitions.

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[6] *Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 7560*, 73rd Cong., 2d Sess. at 28 (1934), *reprinted in* 3 ABA Section on Labor and Employment Law, *The Railway Labor Act: A Legislative History* § 3 (1988).

[7] *Id.* at 43.

Congress therefore added § 2, Seventh to the RLA, 45 U.S.C. § 152, Seventh to fill this void by prohibiting "chang[es] in the rates of pay, rules and working conditions of its employees, as a class, as embodied in agreements, except in the manner prescribed in such agreements or in section 6." As this Court has stated, "the purpose of § 2, Seventh is two-fold: it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures." *Shore Line*, 396 U.S. at 156.

Thus, Congress determined that the rule continuing extant RLA collective bargaining agreements over bankruptcy reorganizations and emergency consolidations should be made generally applicable to corporate restructurings covered by the RLA.

(4) Finally, it is noteworthy that in 1978, when Congress comprehensively overhauled the Bankruptcy Code, Congress *rejected* proposals to permit trustees and debtors-in-possession to modify collective bargaining agreements in the rail industry without exhausting the RLA's bargaining procedures. Instead, "[r]eflective of the long-standing special treatment afforded railway labor," *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 n.8 (1984), Congress reaffirmed and reenacted the limitation on changes in railroad labor contracts as originally incorporated in the 1933 Bankruptcy Act. The House Judiciary Committee explained:

> The subject of railway labor is too delicate and has too long a history for this code to upset established relationship. The balance has been struck over the years. This provision continues the balance unchanged. [H.R. Rep. 95-595, 85th Cong. 1st Sess. at 423 (1977)]
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The sum of the matter is this: since 1933, Congress has on several different occasions mandated a legal requirement that RLA collective bargaining agreements be



deemed to continue over various forms of corporate reorganizations, such as bankruptcies and consolidations. The office of RLA § 2, Seventh is to state that mandate in general terms as part of the permanent railroad labor law.

Given these congressional actions, it follows that the instant case is properly resolved by holding that, as a matter of law, upon acquiring and continuing to operate P&LE's railroad assets, P&LE Railco is bound by the P&LE collective bargaining agreements as P&LE's successor until such agreements are modified through the processes of the RLA.

### II. Where A Union, Pursuant To RLA § 6, Initiates Bargaining Over The Effects Of A Corporate Reorganization On Incumbent Employees, The Employer Must Preserve The "Objective Working Conditions" Of The Employees Until The Act's Mandated Negotiation Process Is Concluded

Our showing in Part I establishes that the RLA provides, as a matter of law, that the extant P&LE collective bargaining agreements survive a corporate reorganization in which the successor entity continues P&LE's operations. We now show that even if that were not true, the RLA would preclude P&LE from reorganizing in a manner that would alter the "objective working conditions" of P&LE's employees for so long as the Company and its employees' exclusive representatives are involved in the process of negotiations and mediation over the effects of the reorganization on those employees mandated by RLA § 6.

A. Analysis properly begins with RLA § 2, First, 45 U.S.C. § 152, First, which imposes on unions and carriers alike "the duty . . . to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions." As this Court has stated, the duty created by § 2, First lies at "[t]he heart of the Railway Labor Act," *Railroad Trainmen, supra*, 394 U.S.

at 377, and "is central to the effective working" of that Act, *Chicago & N.W.R.Co. v. Transportation Union*, 402 U.S. 570, 578 (1971).

RLA § 6, in turn, provides the framework for implementing this duty to bargain. That section provides, in pertinent part, that

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice. . .

In this case, the unions sought to invoke § 6 by serving a notice on the carriers stating the unions' desire to negotiate over "the effects of P&LE's proposed reorganization on P&LE's employees." That notice set forth the text of several new provisions the unions sought to have added to the extant collective bargaining agreements in order to afford P&LE's employees enhanced job security in the event of a sale of P&LE's assets.

It is beyond dispute that the unions' proposal constitutes a proper § 6 notice. The unions clearly sought a "change" in the existing "agreements." And the changes the unions sought unmistakably "affect[ed] rates of pay, rules or working conditions," and hence were subject to mandatory bargaining; the unions' proposal, if agreed to, would determine both the "rules" to be followed by any successor employer in staffing its jobs and the "rates of pay" and "working conditions" of the employees of the successor employer.

This Court's decision in *Telegraphers v. Chicago N.W.R. Co.*, 362 U.S. 330 (1960), confirms this reading of § 6. In that case a union, in response to a carriers' plan to consolidate operations and eliminate jobs, served a notice on the carriers stating the union's desire to negotiate a contractual provision prohibiting the elimination of



any jobs. The carrier contended that the union's notice "did not raise a bargainable issue." *Id.* at 332. This Court disagreed, reasoning as follows:

> Plainly, the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. [362 U.S. at 336.]

Thus *Telegraphers*—at the very least—establishes that proposals relating to the effects of a corporate reorganization on the corporation's employees do "raise a bargainable issue." [8]

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[8] Indeed, as the passage from *Telegraphers* quoted in text indicates, *Telegraphers* appears to go further and to require bargaining over decisions which affect jobs, such as consolidations of operations and not only over the decisions' effects.

That reading of *Telegraphers* is buttressed by *First National Maintenance, supra*, 452 U.S. at 687 n.23 in which the Court, while holding that the NLRA does *not* require bargaining over a closing decision, suggested that the RLA may well be different because "the mandatory scope for bargaining" under the two laws is "not coextensive." *See also Telegraphers*, 362 U.S. at 338 ("In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively").

Against this background, the suggestion of P&LE and several of its *amici curiae* that the NLRA provides for a broader scope of bargaining than the RLA is both erroneous and beside the point in this case. P&LE bases that argument entirely on the fact that in crafting NLRA § 8(d), 29 U.S.C. § 158(d), the phrase "terms and conditions of employment" rather than the phrase "working condi-

B. Having thus properly invoked RLA § 6's "major dispute" procedures, the unions' notice necessarily triggered the Act's "status quo" obligation as set forth in that section, in § 5, 45 U.S.C. § 155 and in § 10, 45 U.S.C. § 160. Section 6 states the general rule:

> In every case where such notice of intended change has been given . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by § 5 of this title, by the Mediation Board. . .

Section 5, in turn, provides that even after the Mediation Board has "finally acted," for a period of "thirty days thereafter . . . no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." And if, during that 30-day period, a presidential emergency board is appointed, § 10 of the Act provides that "for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

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tions" was chosen to delimit the scope of bargaining and that this choice was made because the 1947 Congress viewed the former phrase as broader than the latter. *See* Pet. Br. at 24-25 & nn.8-9. But RLA § 2, First, requires bargaining over "*rules and* working conditions"—and not over "working conditions" alone—and there is nothing in the legislative history of NLRA § 8(d) which suggests that the 1947 Congress viewed RLA § 2, First *in its entirety* as narrower than NLRA § 8(d) in its entirety.

It is of at least equal moment that there is nothing in the legislative history of RLA § 2, First—which was enacted in 1926 not in 1947—to suggest that the 1926 Congress had a narrow scope in mind for the phrase "rules and working conditions."

Thus, the materials on which P&LE relies do not impeach *First National Maintenance's* suggestion that the RLA provides a broader scope for bargaining than the NLRA, and those materials surely do not impeach the holding of *Telegraphers* that issues of the type raised here are bargainable under the RLA.



In the instant case, P&LE proposes to make the most profound changes in the status quo while § 6's negotiation and mediation procedures are underway. At the time the § 6 notice was served, there were 500 P&LE employees covered by the extant collective bargaining agreements who were paid agreed-upon wages and benefits and who worked under agreed-upon conditions. P&LE desires to take actions which would terminate their employment, which would provide for the hiring of a new workforce of one-third the present size, and which would reduce the compensation and fringe benefits of that new workforce. Such action would plainly constitute an "alter[ation]" of "rates of pay, rules, or working conditions" within the ordinary and common-sense meaning of those terms.

P&LE and its *amici curiae* argue, however, that § 6's prohibition on such alterations of the status quo while negotiation and mediation are proceeding should not be read in its ordinary sense. According to P&LE and its *amici curiae*, the words of § 6 are terms of art which maintain nothing more than "the existing provisions, if any, in the parties' collective bargaining agreements which address the effects of corporate transactions." Br. of Airline Industrial Relations Conference at 13. Thus because (in P&LE's view) the Company's proposed actions "would not 'change' the *agreements* in any respect," those actions are permitted by § 6. *See* Pet. Br. at 29 (emphasis added). This argument is contrary to both the plain language of the statute and its authoritative construction by this Court.

To begin with, P&LE's argument cannot be squared with the statutory text. According to its terms, § 6 is invoked by a notice "of an intended change *in agreements* affecting rates of pay, rules or working conditions." But once § 6 is invoked, what must be preserved is, according to the second sentence of § 6, the "rates of pay, rules or working conditions" then in force. While Congress did add the phrase "in agreements" to the first sentence of

§ 6 and Congress could have added the same phrase to the second sentence thereby requiring preservation of only the terms of agreements, the fact is that Congress did not do the latter.

Indeed, the argument that P&LE and its *amici curiae* make here is precisely the argument that was made and rejected in *Shore Line*. That case arose out of a carrier's attempt to change the place of assignment of various of its employees. The union first grieved that proposed change but a Special Board of Adjustment rejected that grievance, finding "nothing in the rules of agreement which precludes this carrier from establishing an outside assignment." 396 U.S. at 146 n.9. The union then filed a notice under § 6 seeking to change the parties' agreement to prohibit the carrier from varying the employees' place of assignment. While the § 6 procedures were underway, the union sought to prevent the carrier from exercising its contractual privilege to vary the assignments.

Before this Court, the carrier argued that "the status quo which the Act equires be maintained consists only of the working conditions specifically covered in the parties' existing collective-bargaining agreement." 396 U.S. at 143. The Court emphatically rejected that contention.

The *Shore Line* Court began (as we did above) by tracing § 6's language and by noting "that the language of § 6 simply does not say what the railroad would have it say. Instead, the section speaks plainly of 'rates of pay, rules, or working conditions' without any limitation to those obligations already embodied in collective agreements." 396 U.S. at 148.

The Court went on to conclude that the "railroad's interpretation of [§ 6] is sharply at variance with the overall design and purpose of the Railway Labor Act," 396 U.S. at 248, explaining:

> It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others. When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled. If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively. [396 U.S. at 154-55.]



Based on this reasoning the Court held that § 6 is properly read to require carriers "to preserve and maintain unchanged those *actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.*" *Id.* at 153 (emphasis added). Applying that test, the Court concluded that the carrier in *Shore Line* could not shift the point of assignments during the status quo period even though there was no contractual prohibition on so doing:

> We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, *and clearly these conditions need not be covered in an existing agreement.* . . . Here . . . the dispute over the railroad's establishment of the Trenton assignments arose at a time when actual working conditions did not include such assignments. It was therefore incumbent upon the railroad by virtue of § 6 to refrain from making outlying assignments at Trenton or any other place in which there had previously been none, *regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement.* [396 U.S. at 153-54 (emphasis added).]

*Shore Line* controls this case. Here, "the dispute . . . arose at a time when actual working conditions" included the collectively-bargained wage rates, benefits, rules, and standards. Thus here, as in *Shore Line*, "it was . . . incumbent upon the railroad by virtue of § 6 to refrain from" altering those conditions pending the outcome of negotiation and mediation.

C. The foregoing is not to say that under *Shore Line* a § 6 notice invariably freezes the precise situation as it exists at the instant the § 6 notice is served. A collective bargaining agreement's express authorization to act in a particular manner is itself part of what we understand the "objective working conditions" to be. Thus the continuing exercise of such an authority according to its terms and in conformity with the prior understandings of the parties after § 6 is invoked would not, in our view, offend that section. By the same token, a carrier may have exercised a particular prerogative in a particular way under particular circumstances with sufficient regularity that the prerogative, too, becomes part of the "objective working conditions"; in that event, the carrier could, during the status-quo period, continue to exercise that prerogative—in the same way and under the same circumstances—without violating § 6. *Shore Line* makes this point explicit:

> [T]he mere fact that the collective agreement before us does not expressly prohibit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions. [396 U.S. at 153-154.]

Section 6 does not, in other words, trump either party's hand by nullifying their settled expectations firmly grounded in their actual experience under their collective bargaining agreement. *Compare, Air Cargo, Inc. v. Local Union 851*, 733 F.2d 241, 246 (C.A. 2, 1984).



In this case, however, P&LE does not even claim any express contractual authorization to terminate its employees where a corporate reorganization results in the transfer of P&LE operations to another corporate entity. Nor does P&LE claim that its proposed action is of a piece with a well-established past practice. Rather, as we have not seen, P&LE's sole claim is that the action "would not 'change' the agreements in any respect." P. 23 *supra*. And as we have also seen, § 6, as authoritatively construed in *Shore Line*, leaves no room for that argument.

D. P&LE protests the "practical effect" of the statutory interpretation set forth above "is to eliminate the managerial prerogatives of RLA employers." Pet. Br. at 21. Whether in the railroad industry, "go[ing] out of a business is a fundamental managerial prerogative," Pet. Br. at 18, is itself open to serious question. After all, this industry—unlike most other, industries (such as those considered in *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965))—has been so heavily regulated that governmental permission has been required before an enterprise can begin operating as a carrier, and, equally to the point, permission has been required before a certified carrier may end its operations or even reduce its services.

We do not pursue P&LE's complaint further, however, because in any event, P&LE's claim that interpreting § 6 in the manner set forth above would "eliminate managerial prerogatives" is simply wrong. *P&LE has been free at all times to negotiate as part of its labor contracts a clause expressly authorizing P&LE to take the type of action contemplated here.* As we have seen, had P&LE done so, that authorization would have become part of the applicable "objective working conditions" and P&LE's exercise of that authority following receipt of a § 6 notice would not have violated that section. Thus the dilemma P&LE now faces is entirely of its own making as the

result of its failure to negotiate an express authorization of the course of action on which the company now seeks to embark.

It is, of course, true that given that failure, P&LE now faces substantial pressure to succumb to the unions' demands on the effects issues if P&LE wishes to consummate a sale without waiting for a prolonged process of negotiation and mediation. But that pressure is an intrinsic part of the RLA's statutory scheme; as the Court emphasized in *Shore Line*:

> [S]ince disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce. [396 U.S. at 150]

Indeed, by seeking to escape that pressure and to be free to act forthwith, P&LE threatens the RLA's fundamental policies. For if the P&LE were free to "resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. *Only if both sides are equally restrained can the Act's remedies work effectively.*" *Id.* (emphasis added).

## CONCLUSION

For the above stated reasons, the decision below should be affirmed.

Respectfully submitted,

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